Supreme Court, U.S.
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NO. _____

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

MICHAEL J. SCARFIA,

Petitioner,
vs.

TRAVELERS INDEMNITY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it was error to impose the sanction of striking the Petitioner's pleadings and entering a default judgment against the Petitioner merely because he invoked his Fifth Amendment privilege in his deposition in this case.
2. Whether the Petitioner waived his Fifth Amendment privilege.
3. Whether it was error to deny the Petitioner an in camera hearing to invoke his Fifth Amendment privilege upon a finding of res judicata.
44. Whether the Bankruptcy Court had jurisdiction to award a money judgment against the Petitioner under 11 U.S.C. § 523.

LIST OF ALL PARTIES

All parties whose judgment is sought to be reviewed appear in the caption of the case.

There is no parent company or subsidiary to Travelers Indemnity Company that is known to the Petitioner.

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PRELIMINARY STATEMENT

References to the parties in this case will be made as follows:

References to the Petitioner, MICHAEL J. SCARFIA, will be referred to as "SCARFIA", the Defendant, or the Debtor.

References to the Respondent, TRAVELERS INDEMNITY COMPANY, will be referred to as "TRAVELERS", the Plaintiff, or the Creditor.

OPINIONS BELOW

1. Michael J. Scarfia v. Travelers Indemnity Co., 94-2235 (11th Cir. September 20, 1994)
2. Michael J. Scarfia v. Travelers Indemnity Co., No. 94-2235 (11th Cir. August 11, 1994)
3. Michael J. Scarfia v. Travelers Indemnity Co., No. 92-0718-CIV-T-23A (February 2, 1994)
4. The Travelers Indemnity Co. v. Michael J. Scarfia, Case No. 86-571 (Bktcy. M.D. Fla. March 9, 1992)

STATEMENT OF JURISDICTION

This appeal is from the Judgment rendered in the United States Court of Appeals for the Eleventh Circuit on August 11, 1994, which affirmed the Judgment entered on February 1, 1994 by the United States District Court, Middle District of Florida, Tampa Division. The Judgment entered by the United States District Court on that date affirmed the entry of the Final Judgment of Default entered in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, on March 9, 1992.

The Bankruptcy Court's conclusions of law were subject to de novo review by the United States Court of Appeals. In Re Comer, 723 F.2d 737 (9th Cir. 1984).

This Petition was timely filed pursuant to Rule 13, Supreme Court Rules, in that the United States Court of Appeals for the Eleventh Circuit denied this Petitioner's

Petition for Rehearing on September 20, 1994, and this Petition for Writ of Certiorari was filed on or before December 19, 1994.

The Supreme Court has jurisdiction in this case pursuant to Rule 10, Supreme Court Rules, by virtue of the fact that the United States Court of Appeals in and for the Eleventh Circuit, by affirming the decision of the United States District Court, has rendered a decision in conflict with the Fifth Amendment to the United States Constitution, and In Re: Connelly, 59 B.R. 421 (Bktcy. M.D. Ill. 1986); and In re Endres, 103 B.R. 49 (Bktcy. M.D. N.Y. 1989); as well as 11 U.S.C. § 523 and In re Harrell, 754 F.2d 902 (11th Cir. 1985); and In re Lissner Corp., 98 B.R. 812 (M.D. Ill. 1989) and Clausen Co. v. Dynatron/Bondo Corp., 889 F.2d 459 (3d Cir. 1989).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. 11 U.S.C. § 341 - MEETINGS OF CREDITORS AND EQUITY SECURITY HOLDERS

(a) Within a reasonable time after the order for relief in a case under this title,

the United States Trustee shall convene and preside at a meeting of creditors.

(b) The United States Trustee may convene a meeting of any equity securities holders.

(c) The Court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors.

III. 11 U.S.C. § 523

(Full Text of this Statute may be found in the Appendix to

this Petition.)

IV. BANKRUPTCY RULE 7001

(Full Text of this Rule may be found in the Appendix to

this Petition.)

V. RULE 10, RULES OF THE SUPREME COURT OF THE UNITED STATES

(Full Text of this Rule may be found in the Appendix to

this Petition.)

STATEMENT OF THE CASE

Appellee TRAVELERS INDEMNITY COMPANY ("TRAVELERS") was the construction bonding company for C.M. Systems, Inc., a commercial general contractor. Appellant MICHAEL J. SCARFIA, President and sole stockholder of C.M. Systems, Inc., guaranteed bonds issued by TRAVELERS. On April 25, 1986, C.M. Systems and MR. SCARFIA each filed Chapter 11 proceedings.

Although C.M. Systems' construction jobs in progress as of the April 25, 1986 filings of the C.M. Systems and SCARFIA petitions could have been completed at close to the contract amounts, TRAVELERS paid others to finish at amounts materially beyond the prices at which C.M. Systems could have completed them and thus from which TRAVELERS alleged losses stem.

On March 25, 1986, "Terramar Mining Corporation" filed its Chapter 11 Petition in

the Bankruptcy Court for the Middle District of Florida.

On May 28, 1986, at the 11 U.S.C. § 341 First Meeting of Creditors of C.M. Systems, Inc., MR. SCARFIA fully testified about the affairs of C.M. Systems, Inc.

In June 1986, MR. SCARFIA appeared and testified about his affairs at the "341 meeting" of creditors in his own Chapter 11. At both of these "341" meetings, attorneys for creditors appeared and examined MR. SCARFIA. On October 21, 1986, SCARFIA converted his individual Chapter 11 to a Chapter 7 liquidation.

In October 1986, a creditor of Terramar Mining Corporation filed a Motion to Appoint Trustee in the Terramar proceeding. The Hearing of that Motion commenced on October 10, 1986, during which accusations of improprieties were made against MR. SCARFIA personally and against Max Mitchell (Mr.

Mitchell presided over Terramar). In re Terramar Mining Corporation, Case No. 86-1143 (Bktcy. M.D. Fla. 1986).

At the same time, various creditors in the C.M. Systems, Inc., bankruptcy also sought appointment of a Trustee. Trustees for both the Terramar and C.M. Systems bankruptcies were eventually appointed.

On November 4, 1986, the Court entered its Order converting the C.M. Systems case from a Chapter 11 proceeding to a Chapter 7 proceeding.

On November 17, 1986, Plaintiff/Appellee TRAVELERS INDEMNITY COMPANY filed an adversary Complaint in Appellant SCARFIA's personal Chapter 7 bankruptcy proceeding asserting pre- and post-petition fraud by MR. SCARFIA to declare Appellant's alleged debt to TRAVELERS (SCARFIA's obligation as a guarantor) as non-dischargeable under 11 U.S.C. § 523.

During the hearings for appointment of a Trustee in Terramar Mining Corporation on October 10 and 13, 1988, undersigned counsel Leo H. Meirose, Jr., was informed by Messrs. David Steen (attorney for TRAVELERS) and Charles Tatelbaum, attorney for some other of the C.M. Systems' creditors, that the United States Bankruptcy Court for the Middle District of Florida (Judge Paskay) had sent a letter to the United States Attorney's Office for the Middle District of Florida to the effect that an investigation should be initiated relative to SCARFIA and to Mr. Max Mitchell and their purported pre- and post-petition acts. This letter was apparently issued upon allegations made during the aforementioned hearing to appoint a Trustee in the Terramar proceeding.

Messrs. Steen and Tatelbaum also at that time advised Mr. Meirose that an investigation was already ongoing and that both Messrs. Steen and Tatelbaum had already

conferred with the Federal Bureau of Investigation.

On March 10, 1987, Appellee filed a "Second Amended Complaint Objecting to Dischargeability of Debt" alleging that pre-petition financial statements submitted by C.M. Systems to TRAVELERS upon which TRAVELERS had allegedly relied in issuing construction bonds were fraudulent ultimately resulting in certain surety bond claims. On May 1, 1987, Defendant SCARFIA filed his Answer and Affirmative Defenses to TRAVELERS' Second Amended Complaint, denying TRAVELERS' allegations and raising a number of affirmative defenses to TRAVELERS' claims. Appellant also invoked Defendant SCARFIA's Fifth Amendment privilege against self-incrimination.

TRAVELERS then set the deposition of MICHAEL J. SCARFIA. MR. SCARFIA appeared at his deposition on July 13, 1987, but declined

to answer TRAVELERS' questions by invoking his Fifth Amendment privilege.

A Pre-Trial Conference was then held pursuant to the Bankruptcy Court's Pre-Trial Order entered on December 14, 1987.

Despite invocation of Fifth Amendment privilege, Appellant complied with the requirement of filing a Pre-Trial Statement prior to the Pre-Trial Conference in that matter. TRAVELERS did not file a Pre-Trial Statement.

TRAVELERS had previously filed a Motion to Compel the Defendant to respond to deposition questions.

On March 23, 1988, the Bankruptcy Court entered an Order on TRAVELERS' Motion to Compel, in which the Court required that MR. SCARFIA file an Affidavit as to why the Debtor was invoking his Fifth Amendment

privilege. MR. SCARFIA filed the Affidavit in camera with the Court.[1] The Bankruptcy Court then scheduled an in camera hearing for August 25, 1988, to review the documents submitted, along with the Affidavit.

On September 20, 1988, the Court entered its Order specifying that counsel for TRAVELERS was not allowed to be present at the in camera hearing.

On October 6, 1988, the Bankruptcy Court entered an Order scheduling an in camera hearing on TRAVELERS' Motion to Compel. That Order ultimately became the subject of an interlocutory appeal to this Court on the issue of whether a Court Reporter should be present. That appeal was denied by this Court on November 30, 1989.

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[1] The Affidavit submitted by MR. SCARFIA along with attachments and related documents are "sealed" documen which are referenced in the Appendix attached hereto.

The Bankruptcy Court then entered an Order to Show Cause on 2/20/90 requiring MR. SCARFIA to show why the Bankruptcy Court should not require him to comply with the Appellee's "discovery demands" which at that point were only the questions asked of MR. SCARFIA at his deposition.[2]

On May 17, 1990, the Bankruptcy Court entered its Order Discharging Order to Show Cause. The Court required that the Defendant "answer the Complaint"[3] and scheduled a Pre-Trial Hearing, and directed the Defendant to comply with the Plaintiff's Motion to Compel Discovery."

It is important to note that TRAVELERS INDEMNITY COMPANY never initiated any other discovery in this case other than to attempt to take the deposition of MICHAEL J. SCARFIA.

The Defendant had already filed an Answer to the Second Amended Complaint on May 1, 1987.

On April 19, 1990, the Bankruptcy Court ruled that there would be no in camera hearing as the District Court had already ruled in Scarfia that MR. SCARFIA had waived his Fifth Amendment privilege; the Bankruptcy Court made this ruling on the asserted basis of "res judicata" or "collateral estoppel."

Appellant timely moved for leave to appeal the Order Discharging the Order to Show Cause and compelling the Defendant to respond to deposition questions. That interlocutory appeal was denied by this Court on the grounds that the interlocutory appeal, in that instance, would not advance the litigation and that it would not establish a controlling question of law.

During the pendency of that Motion for Leave to Appeal, Appellant initiated discovery with a Request for Production and with Interrogatories to Plaintiff. TRAVELERS neither responded nor objected to either

discovery request. Later, Appellant also served Requests for Admissions to which TRAVELERS also did not respond.

Notwithstanding that Defendant SCARFIA had previously filed an Answer and Affirmative Defenses, Appellee's counsel moved for sanctions and entry of a Default Judgment on July 23, 1990 claiming, inter alia, that an Answer had not been filed and filed a Motion for Protective Order.

The Bankruptcy Court then granted TRAVELERS' Motion for Protective Order precluding further discovery from TRAVELERS, and denied the Appellee's Motion for Entry of a Default Judgment.

TRAVELERS then renewed its Motion for Default, first ex parte, and later by a non-ex-parte Motion.

On March 9, 1992, the Bankruptcy Court entered its "Final Judgment of Default."

The Defendant appealed from the March 9, 1992 "Final Judgment of Default", which was affirmed by the District Court. The District Court's affirmance of the entry of the "Final Judgment of Default" was appealed to the United States Court of Appeals in and for the Eleventh Circuit. The Court of Appeals affirmed the District Court's Judgment.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS' DECISION AFFIRMING THE DENIAL OF SCARFIA'S RIGHT TO INVOKE HIS FIFTH AMENDMENT PRIVILEGE AND FINDING THAT SCARFIA HAD WAIVED HIS FIFTH AMENDMENT PRIVILEGE DIRECTLY CONFLICTS WITH AMENDMENT V TO THE UNITED STATES CONSTITUTION AND IN RE CONNELLY, 59 B.R. 421 (BKTCY. M.D. ILL. 1986).

The Fifth Amendment to the United States Constitution provides that no person shall be compelled to incriminate himself. U.S. CONST. amend V.

Apprehension of a real, imminent and likely criminal prosecution gives rise to a claim of privilege under the Fifth Amendment. U.S. v. Paris, 812 F.2d 471 (9th Cir. 1987). The form of a deposition and the subsequent

use of that testimony by law enforcement is within the Fifth Amendment protection. National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987); In Re: Grand Jury Proceedings, 814 F.2d 791 (1st Cir. 1987).

The cases which have interpreted the application of the Fifth Amendment in Bankruptcy proceedings have uniformly adopted the procedures set forth in In Re: Connelly, 59 B.R. 421 (Bktcy. M.D. Ill. 1986). In Re: Connelly, supra, requires a person who seeks to invoke the Fifth Amendment be granted an in camera hearing in which to present his "minimal credible reasons" for the invocation.

Klein v. Harris, 667 F.2d 274 (2d Cir. 1981) provides the test for waiver of the Fifth Amendment:

1. If the witness' prior statements have created a significant likelihood that a distorted view of the truth be left with the finder of fact, and

2. If the witness had reason to know that his prior statements would be interpreted as a waiver of the Fifth Amendment privilege against self incrimination.

The Bankruptcy Court granted SCARFIA an in camera hearing, but overruled SCARFIA's objections to the presence of a Court Stenographer at the hearing. SCARFIA then filed a Motion for Leave to Appeal that interlocutory order, which was denied by the Bankruptcy Court. The Bankruptcy Court made this ruling on the basis of "res judicata" or "collateral estoppel" finding that SCARFIA had waived his Fifth Amendment privilege in a companion Bankruptcy case, Holiday Bank v. Scarfia, 104 B.R. 462 (Bktcy. M.D. Fla.

1989), which was the disposition of an interlocutory appeal in that case.

Reliance on interlocutory decision as a binding precedent is error. In Re: Lissner Corp., 98 B.R. 812 (M.D. Ill. 1989); Clausen Co. v. Dynatron/Bondo Corp., 889 F.2d 459 (3rd Cir. 1989).

Thus, the Bankruptcy Court's reliance on the Holiday Bank v. Scarfia case as a binding precedent in the Travelers v. Scarfia case was error, as the Holiday decision was an interlocutory one. The Bankruptcy Court's decision to rely on that interlocutory decision is in direct conflict with In Re: Lissner, supra; Clausen Co., supra. The decision of the United States Court of Appeals for the Eleventh Circuit also directly conflicts with the Lissner and Clausen cases regarding the reliance on an interlocutory decision as binding precedent.

Finally, the United States Court of Appeals for the Eleventh Circuit's decision affirming the Bankruptcy Court's decision to deny SCARFIA the right to invoke his Fifth Amendment privilege and the right to an in camera hearing is in direct derogation of the Fifth Amendment to the United States Constitution and In re Connelly, supra.

Due to the conflict of the Eleventh Circuit Court of Appeals in this case with the Federal Constitution as well as Federal case law, this Court should grant certiorari review of this case.

II. THE UNITED STATES COURT OF APPEALS' AFFIRMANCE OF THE DECISION TO STRIKE SCARFIA'S PLEADINGS IS IN DIRECT CONFLICT WITH IN RE ENDRES, 103 B.R. 49 (BKTCY. M.D. N.Y. 1989).

In the Bankruptcy case of In Re: Endres, 103 B.R. 49 (Bktcy. M.D. N.Y. 1989), the debtor declined to testify at his deposition due to the invocation of the Fifth Amendment. The Creditor moved to strike the pleadings of the Defendant and enter a default for failure of the Defendant to testify at deposition. The Bankruptcy Court denied the Motion to Strike the defendant's pleadings, holding that the relief sought by the Creditor was not an appropriate sanction for the debtors' improper invocation of Fifth Amendment rights at deposition in a dischargeability proceeding, absent proof of prejudice to the creditor. Id. at 55.

In the instant case, the Bankruptcy Court did exactly what the Court in In Re: Endres decided was improper: imposed the sanction of striking SCARFIA's pleadings because of his invocation of the Fifth Amendment and declination to testify at his deposition. This is in spite of the failure of TRAVELERS to show to the Court that they would be prejudiced by the lack of the defendant's deposition in this case. In fact, TRAVELERS had attempted no other discovery during the pendency of the adversary proceeding prior to the scheduling of SCARFIA's deposition. As shown by the record in the Bankruptcy adversary proceeding, TRAVELERS had been in possession of SCARFIA's records for six years, and had every opportunity to adequately prepare their case against SCARFIA via other discovery methods.

The United States Court of Appeals affirmance of the Bankruptcy Court's decision is in direct conflict with In Re: Endres, supra, and also deprives SCARFIA of due process. On this basis, this Court should allow review of the erroneous decisions made in this case, and SCARFIA's Petition for Writ of Certiorari should be granted.

III. THE UNITED STATES COURT OF APPEALS' AFFIRMANCE OF THE BANKRUPTCY COURT'S ENTRY OF A MONEY JUDGMENT IN THIS CASE DIRECTLY CONFLICTS WITH 11 U.S.C. § 523 AND WITH ITS OWN DECISION IN IN RE HARRELL, 754 F.2D 902 (11TH CIR. 1985).

11 U.S.C. § 523 does not give the Bankruptcy Court jurisdiction to enter a money judgment after it has determined that a debt is not dischargeable under the Bankruptcy Code. In fact, the section itself, as well as the legislative history of that section, is silent with respect to the entry of a money judgment by the Bankruptcy Court, and only refers to the determination of whether or not a claim is non-dischargeable.

In In Re: Harrell, 754 F.2d 902 (11th Cir. 1985), the Court held that it was not

the function of the Bankruptcy Court to arrive at a precise amount of alimony to which the debtor's ex-wife was entitled under 11 U.S.C. § 523, and the Bankruptcy Court's task was complete once it determined that the alimony itself was non-dischargeable. Id. at 905. The Court went on to explain that the State Court is in a better position to make the determination of the amount of the obligation based on the law in effect in the state where the obligation arose, and using state court process to enforce and execute on the debt.

The Final Judgment of Default entered by the Bankruptcy Court in the instant case is a Judgment which establishes that the debt in question is non-dischargeable. The Bankruptcy Court is without jurisdiction to determine the amount of the debt owed, and enter a money judgment thereon. The Bankruptcy Court's decision to enter a money

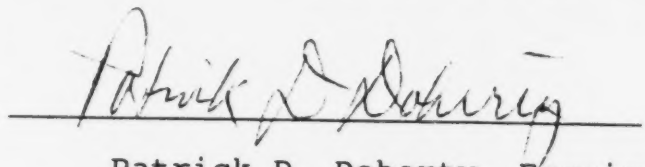
judgment was in direct conflict with 11 U.S.C. § 523 and In Re: Harrell, supra. The United States Court of Appeals for the Eleventh Circuit's decision affirming the Bankruptcy Court's entry of that money judgment is not only in conflict with the Bankruptcy Code, but is also in direct conflict with its own prior decision in the case of In Re: Harrell. Because of this direct conflict, it is within this Court's jurisdiction to grant certiorari review of this case.

CONCLUSION AND RELIEF SOUGHT

The decisions by the Bankruptcy Court which resulted in the entry of a Final Default Judgment against SCARFIA, and the de novo review and subsequent affirmance of those decisions by the United States Court of Appeals for the Eleventh Circuit, are in direct conflict with the United States Constitution, Federal Statutes and case law, for reasons which are more thoroughly discussed in this Petition.

Therefore, pursuant to Rule 10 of the United States Supreme Court Rules, this Court has discretion to grant certiorari review of this case.

WHEREFORE, the Petitioner, MICHAEL J. SCARFIA, respectfully requests this Court grant its Petition for Writ of Certiorari.



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